

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ARZOLA,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 270901

Wayne Circuit Court

LC No. 05-003866-01

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant was charged with three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, defendant was convicted of one count of assault with intent to do great bodily harm less than murder and was also convicted of felony-firearm, MCL 750.227b. Defendant was sentenced to six months to 10 years in prison for the assault conviction and to two years in prison for the felony-firearm conviction. We affirm.

This case arises out of an incident in which four people, Letitia Smith, Tim Dennison, Robert Greer, and Crystal Yount, were in a van next to a drug house when someone opened the sliding door of the van, shot Greer and Yount, and hit Dennison over the head with the gun. Smith and Greer identified defendant as the shooter. Yount claimed defendant was not the shooter, and Billy Williams, who saw a man with a gun from a window of the drug house, claimed the man was not defendant.

Defendant argues that the prosecutor committed misconduct by introducing evidence that defendant was a member of the Highwaymen motorcycle club, eliciting and attempting to elicit evidence of prior arrests and drug convictions of defense witnesses, and denigrating defense counsel. We disagree. Defense counsel did not object to the questioning and testimony regarding the prior arrests or drug convictions, so these issues are not properly preserved for review. *People v Pipes*, 475 Mich 267, 278; 715 NW2d 290 (2006). “Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo.” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture, an error must have occurred, the error must have been clear or obvious, and the error must have affected substantial rights, meaning that it must have affected the outcome of the trial. *Id.*, p 763.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor's line of questioning is reviewed to determine whether the prosecutor elicited the testimony in good faith. *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). A prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995).

Defendant first raises the preserved argument that the prosecutor committed misconduct by eliciting testimony regarding defendant's membership in the Highwaymen motorcycle club or gang. At a pretrial hearing, defense counsel raised this issue and requested that the court prohibit any possible testimony regarding defendant's involvement in a motorcycle gang. The court refused to make a decision regarding the admissibility of the evidence at that point and chose to address the issue based on its relevance as the testimony was presented at trial. During Smith's testimony, the trial court sustained defense counsel's objection when the prosecutor asked if defendant belonged to the club, and Smith was not permitted to answer.

During the testimony regarding the investigation following the shootings, the investigator indicated that there were no suspects at the scene when the police arrived, but that the police received information concerning where the suspect might be. The prosecutor asked why the police did not enter the location where the suspect allegedly was, and the court allowed the investigator to answer, over defense counsel's objection. The investigator responded that the building housed the Highwaymen club, and defense counsel moved for a mistrial, arguing that the testimony was highly inflammatory. The court overruled the objection. The prosecutor continued to ask why the police did not enter the Highwaymen club's building to apprehend the suspect, and the investigator responded that the police were not adequately equipped to enter the location.

The prosecutor's line of questioning did not constitute misconduct. The court overruled defense counsel's objections and allowed the investigator's testimony. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek, supra*, p 70. The identification of defendant as the shooter was the key issue in the case, and the testimony regarding the reason the police officers did not enter the location to apprehend the alleged shooter was highly relevant. In addition, defendant's membership in the club was never actually established because that testimony was not admitted, and the prosecutor did not continue questioning on the issue once the objection was sustained.

Next, defendant contends that the prosecutor improperly questioned Yount about her prior arrests and involvement in prostitution. A prosecutor may impeach a witness with evidence of prior convictions if the crime involved an element of dishonesty, false statement, or theft. MRE 609; *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Although the prosecutor asked Yount if she had been "arrested for theft or dishonesty," rather than asking if she had been convicted for such offenses, there was no plain error here because Yount responded that she had not. Regarding Yount's testimony that she was a prostitute, this information first came out when defense counsel was examining Smith and asked her if she had engaged in prostitution in front of defendant's store. Smith responded that Yount was the one who had worked in front of defendant's store. In addition, on direct examination, defense counsel questioned Yount regarding her association with Smith, and Yount responded that they worked the streets together. Therefore, the prosecutor's question regarding Yount's work was merely a

response to what had already been brought up by defense counsel. *Fields, supra*, pp 110-111. Moreover, it merely elicited cumulative testimony and thus did not affect the outcome of the trial. *Carines, supra*, p 763.

Next, defendant argues that the prosecutor improperly elicited testimony regarding Williams's drug convictions. There was testimony throughout the trial that Williams's house was a drug house and that his clients would go to the van where the shooting occurred to get high. Therefore, we conclude that additional evidence that corroborated the drug dealing out of Williams's house and showed that he was in prison did not affect the outcome of the trial. *Carines, supra*, p 763. During cross-examination,¹ Williams reiterated that he had run this drug house and admitted to convictions for drug possession. The prosecutor followed up with questions regarding whether Williams did not want to offend defendant because defendant was well known in the neighborhood where Williams sold drugs. The prosecutor was trying to bring into question Williams's veracity after Williams testified that the man with the gun was not defendant. There is no indication that Williams's testimony was elicited in bad faith. *Dobek, supra*, pp 70-71. No plain error is apparent.

Defendant next argues that the prosecutor denigrated defense counsel by suggesting that defendant's former attorney had withheld evidence. Smith testified that a man who represented himself as defendant's detective pulled her behind Chili's Tow Truck Company and asked her to change her statement. In response, defendant called David Bale, the private investigator of defendant's former attorney, William Hackett, to testify that he was hired to locate certain witnesses and obtain statements from them. Bale tape-recorded statements from Smith, Yount, and Vicky Tillman and gave the tapes to Hackett.

The prosecutor expressed his surprise upon hearing about these tapes for the first time during Bale's testimony. The prosecutor began questioning Bale regarding why Hackett had not turned over the tapes during discovery, and Bale responded that he could not answer that. Defense counsel objected to any questioning regarding what someone other than the witness did, and the court sustained the objection. The prosecutor responded, "He is part of the line," and the court warned the prosecutor not to argue further.

A prosecutor may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Nor may a prosecutor suggest that defense counsel is intentionally trying to mislead the jury. *Watson, supra*, p 592. In this case, the prosecutor acted out of frustration upon learning about some taped statements in the middle of trial, but there is no indication of a personal attack on defense counsel. In addition, defense counsel's objections were sustained, and the prosecutor even apologized to the jury in his closing argument for how heated things got in the midst of trial. The prosecutor told the jury not to consider the tapes or whether Hackett was obligated to turn them over and indicated that neither defendant nor present defense counsel were responsible for the tapes.

¹ Williams's testimony from a prior hearing was introduced into the record by defendant because Williams was unavailable as a witness.

Finally, the trial court instructed the jury that the attorneys' statements and questions were not evidence and that the jury was not to consider excluded evidence or stricken testimony. Any possible prejudice was dispelled by the court's instruction. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Defendant was not deprived of a fair trial by the prosecutor's line of questioning or comments.²

Defendant next argues that trial counsel rendered ineffective assistance by failing to object to the elicitation or attempted elicitation of the allegedly improper impeachment testimony discussed earlier. However, the evidence shows that in each instance, trial counsel's lack of objection either was justifiable or did not affect the outcome of the trial. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant lastly argues that his trial attorney rendered ineffective assistance by failing to object to the "clearly improper and harmful opening statement by the prosecutor implying that counsel engaged in unethical behavior." Defendant has completely failed to develop an argument concerning the prosecutor's opening statement and thus has waived this issue for purposes of appeal. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).³

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter

² We further reject defendant's argument that the cumulative effect of the various instances of alleged misconduct deprived him of a fair trial.

³ To the extent that defendant intended to refer in his appellate brief to the prosecutor's questions concerning Bale's tapes, we find, firstly, that defense counsel did object to the prosecutor's questioning and, secondly, that any lack of a further objection by defense counsel did not affect the outcome of the case. *Carbin, supra*, p 600.